SEP 2 1959

JAMES R. BROWNING, Cle

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 239.

BADGER MUTUAL INSURANCE COMPANY AND NORTHWESTERN MUTUAL FIRE ASSOCIATION,
Petitioners,

vs.

SAM SERIO, d b a MAGNOLIA CANNING COMPANY,
Respondent.

REPLY BRIEF FOR PETITIONERS.

THOS. H. WATKINS,
ELIZABETH HULEN GRAYSON,
800 Plaza Building,
Jackson, Mississippi,
Counsel for Petitioners.

WATKINS & EAGER,
800 Plaza Building,
Jackson, Mississippi,
Of Counsel

INDEX

Jurisdiction 1

Reasons for Granting the Writ 4

I. The Court of Appeals below could not reverse the finding of fact of lack of due diligence by the District Judge and vacate the exercise of discretion by the District Judge in denying relief under Rule 60(b)(2) on the ground that there was no due diligence on the part of the movant. Such a ruling is in direct conflict with the decisions of all other Courts of Appeals and of this Court 4

Conclusion 7

Certificate 10

Table of Cases

Anderson v. *Tway*, C.A. 6, 143 F.2d 95, cer. den. 89 L. Ed. 1418 6

Blakeney v. *State*, 87 So.2d 472 6

Campbell v. *American Foreign S. S. Corp.*, C.A. 2, 116 F.2d 926 5

Forsyth v. *Hammond*, 166 U.S. 506, 41 L. Ed. 1095 2

English v. *Mattson*, C.A. 5, 214 F.2d 406 5

F. W. Woolworth Co. v. *Seckinger*, C.A. 5, 125 F.2d 97 5

Greenspahn v. *Seagram*, C.A. 2, 186 F.2d 616 4

Hutto v. *Kremer*, 76 So.2d 204 6

Kahle v. *Amtorg Trading Corp.*, N.J., 13 FRD 107 4

King v. *Leach*, C.A. 5, 131 F.2d 8 5

Land v. *Dollar*, 330 U.S. 731, 91 L. Ed. 1209 2

N.L.R.B. v. *Sunrise Lbr., etc., Corp.*, C.A. 2, 241 F.2d 620, cer. den. 2 L. Ed. 2d 34 6

Orrison v. C. Hoffberger Co., C.A. 4, 190 F.2d 787 6
Prudential Insurance of America v. Gilroy, 154 F.2d 382 5
Redmond v. Marshall, 137 So. 733 6
Roberts v. International Harvester, 179 So. 745 6
Sowder v. Waray Oil Corp., C.A. 10, 231 F.2d 9 6
Stathatos v. Arnold Bernstein S. S. Corp., C.A. 2, 202 F.2d 525 1
Tozer v. Charles A. Krause Milling Co., C.A. 3, 189 F.2d 242 5
U. S. v. Bransen, C.A. 9, 142 F.2d 232 5
U. S. v. General Motors Corp., 323 U.S. 373, 89 L. Ed. 311 2-3
U. S. v Johnson, 327 U.S. 106, 90 L. Ed. 562 2

TEXTS AND STATUTES

Barron and Holtzoff, Sec. 1325 4
Moore's Federal Practice, Sec. 60.22(2) 4
Rule 60(b)(1) 4,5
Rule 60(b)(2) 2, 4, 7
28 U.S.C.A., Secs. 1291-2 2
28 U.S.C.A. 1254 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 239.

BADGER MUTUAL INSURANCE COMPANY AND NORTHWESTERN MUTUAL FIRE ASSOCIATION,

Petitioners,

vs.

SAM SERIO, d/b/a MAGNOLIA CANNING COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONERS.

JURISDICTION.

Opposing counsel have indicated, by citing *Stathatos v. Arnold Bernstein S. S. Corp.*, C.A. 2, 202 F.2d 525*, that this Court does not have power to grant certiorari here

* 201 F.2d 525.

because there is no right to appeal from an allowance of a new trial under 60(b). It is true generally that an appeal will not lie for an error of fact from an order of a District Court allowing a new trial either because the matter is addressed to the discretion of the trial court or because such an order is not a final judgment.*

The jurisdiction of a Court of Appeals is limited by 28 U.S.C.A., Secs. 1291-2, to appeals from "final decisions". This Court on the other hand by 28 U.S.C.A. 1254 can review any case in a Court of Appeals "before or after rendition of judgment or decree".

There is no doubt as to this Court's power to grant the Writ of Certiorari here. It did so in *U. S. v. Johnson*, 327 U.S. 106, 90 L. Ed. 562, when the Court of Appeals of the Seventh Circuit reversed the trial Judge's denial of a Motion for a New Trial (149 F.2d 31), this Court stated:

> "Since we think it important for the orderly administration of criminal justice that findings on conflicting evidence by trial courts on motions for new trials based on newly discovered evidence remain undisturbed except for most extra-ordinary circumstances, we granted certiorari."

This is, we submit, just as important for civil justice in view of the public interest and policy to make an end of litigation. And yet the Court of Appeals of the Fifth Circuit has refused to conform.

See also the case of *Forsyth* v. *Hammond*, 166 U.S. 506, 41 L. Ed. 1095. See also *Land* v. *Dollar*, 330 U.S. 731, 91 L. Ed. 1209 and *U. S. v. General Motors Corp.*, 323 U.S.

*This is not true as to an error of law. Even an order denying a new trial is only reviewable indirectly where there is an abuse of discretion.

373, 89 L. Ed. 311, where this Court considered that the decisions of the Courts of Appeal involved issues "fundamental to the further conduct of the case".

Here it is a matter of general importance that this Court resolve a serious conflict between the ruling of the Court of Appeals of the Fifth Circuit and that of all other Courts of Appeals on this question of procedural law—a question of gravity and general importance to all future litigants within the normal or possible jurisdiction of the Federal Courts in the Fifth Circuit.* Also here there is involved a matter of general importance, as well as an issue fundamental to the future conduct of this case, in that by its decision the Court of Appeals below has either held that newly discovered evidence, in order to justify a new trial, need not probably produce a different result on a new trial, contrary to the decisions of all other Courts of Appeals, or it has decided a serious question of substantive fire insurance law contrary to the readily ascertainable law of the applicable state.**

Quare: Can litigants against corporate defendants who can be served with process in this area have a distinct procedural advantage over litigants suing elsewhere?

**Quare:* Can the District Court here on a new trial grant Petitioners a peremptory instruction on the basis of its prior holding that there was a violation of the contract by Defendant, even if the Records are now produced, since such Records were lost due to the negligence of the Respondent and were not produced within a reasonable time after the fire?

REASONS FOR GRANTING THE WRIT.

I.

The Court of Appeals below could not reverse the finding of fact of lack of due diligence by the District Judge and vacate the exercise of discretion by the District Judge in denying relief under Rule 60(b)(2) on the ground that there was no due diligence on the part of the movant. Such a ruling is in direct conflict with the decisions of all other Courts of Appeals and of this Court.

Respondent does not deny the facts constituting negligence in failing to find his Records for two years after the fire, relying instead on the allegation that there can be no lack of diligence if the party is ignorant of the facts. Respondent overlooks "negligent ignorance". *Greenspahn v. Seagram*, C.A. 2, 186 F.2d 616. Otherwise evidence subsequently discovered would never fall under the condemnation of "lack of due diligence" unless it was knowingly withheld and not produced. Respondent had *means* of knowledge which would have resulted in knowledge upon exercise of due diligence.

Opposing counsel have cited no cases from any other Court of Appeals reversing a District Judge's finding of fact, based upon substantial evidence, that Movant did not exercise due diligence and reversing a decision, in exercise of the discretion of the trial Judge, that Movant was not entitled to relief under Rule 60(b)(2).*

*Rule 60(b)(1) is generally limited to extrinsic mistake, surprise, etc., being usually applied to default judgments, oversight of counsel, absence of notice, etc. Barron and Holtzoff, Sec. 1325; Moore's Federal Practice, Sec. 60.22(2). It cannot enlarge the requirements of due diligence with reference to newly discovered evidence specifically dealt with under Rule 60(b)(2). *Kahle v. Amtorg Trading Corp.*, N.J., 13 FRD 107.

Petitioners can cheerfully adopt and themselves cite *Campbell* v. *American Foreign S. S. Corp.*, C.A. 2, 116 F.2d 926; *King* v. *Leach*, C.A. 5, 131 F.2d 8; *English* v. *Mattson*, C.A. 5, 214 F.2d 406; *F. W. Woolworth Co.* v. *Seckinger*, C.A. 5, 125 F.2d 97 and *U. S.* v. *Bransen*, C.A. 9, 142 F.2d 232, these cases all affirming the District Judges' denial of a motion for a new trial.

In *Tozer* v. *Charles A. Krause Milling Co.*, C.A. 3, 189 F.2d 242, the appellate court merely reversed the lower court in denying relief under Rule 60(b)(1) for an error of law in holding that the defendant had no meritorious defense. There relief was sought by a foreign corporation from a default judgment where the only process served was statutory process upon the Secretary of the Commonwealth of the State of Pennsylvania, and the defendant had no actual knowledge of the pendency of the suit prior to judgment.

The case of *Prudential Insurance of America* v. *Gilroy*, 154 F.2d 382, is another Fifth Circuit case. As a matter of fact in that case the Court of Appeals reversed the denial of a motion for a new trial by the District Court for an error of law in failing to hold that the fact that receipts introduced in evidence and relied upon by the insured were a forgery would change the result. The District Judge had not found that there was no due diligence in the production of certificates of experts that the receipts were forgeries and the appellate court pointed out: "The production of the receipt only two days before the trial had not afforded the company a previous opportunity to do so." Here again however the Fifth Circuit stepped out of line with the decisions of all other Courts of Appeal in reversing the denial of a motion for a new trial by the District Judge on the ground that the newly discovered evidence could change the result by impeaching the tes-

timony of the successful litigant,* the basis of the opinion being: "Proof that the receipts he produced * * * was a forgery would seriously impair the value of her testimony and would suggest that little credence could be given her statement that her husband had no knowledge of the refund and that she was in good faith in receiving and using it."

Opposing counsel attempt to take issue with Petitioners' statement in their brief that the Mississippi rule has always been that due diligence is an indispensable condition precedent to the granting of a new trial on the ground of newly discovered evidence, citing *Hutto* v. *Kremer*, 76 So.2d 204, *Roberts* v. *International Harvester*, 179 So. 745 and *Redmond* v. *Marshall*, 137 So. 733.

Opposing counsel cite *Blakeney* v. *State*, 87 So.2d 472. The facts in this case are revealing, and the cause was reversed for a constitutional deprivation of a criminal defendant of due process of law. The defendant was arrested on November 4, 1955, and arraigned on November 7, 1955. He was unable to employ an attorney until the night of November 9, 1955, due to a misunderstanding as to one he thought had accepted the employment. The case was set for trial for November 10, but when the attorney did not arrive from another town until 1:15 p. m. that day it was passed until the next morning at 8:30, the court

*It is universally held that where the newly discovered evidence merely contradicts a principal witness or attacks his credibility as a witness that the granting of a new trial on newly discovered evidence of such impeaching character is a matter that rests in the sound discretion of the trial court and its determination will not be reversed by the appellate court. *Anderson* v. *Tucau*, C.A. 6, 243 F.2d 95, cer. den. 89 L. Ed. 1418; *N.L.R.B.* v. *Sugrise Lbr., etc., Corp.*, C.A. 2, 241 F.2d 620, cer. den. 2 L. Ed 2d 34; *Souder* v. *Waray Oil Corp.*, C.A. 10, 231 F.2d 9; *Orrison* v. *C. Hoffberger Co.*, C.A. 4, 190 F.2d 787.

denying a motion for a continuance. The attorney told him to make a search of his home for time books or records which could clear him. He found some of these records at 3:30 a. m. the night before the trial. The case was tried on Saturday, November 12 resulting in conviction. After the trial was concluded the defendant found a receipt which would clear him of the charge. The Judge below committed error in holding that the receipt as a matter of law was not "newly discovered evidence". There was no question of any lack of diligence in finding the same. The Court pointed out that it was undisputed that he spent his time when away from court in searching for records, some of which he found at 3:00 or 3:30 a. m. on the morning of the trial. The Court pointed out that it would have been a different situation had the defendant "failed to make a reasonable search to locate the same". The decision of the trial Judge was reversed both for failing to grant the motion for a continuance and for failing to grant the new trial, the court citing and relying on two older cases to the effect that the constitutional requirements of a fair and impartial trial included a reasonable opportunity to prepare for trial.

We submit that this case is no authority for any position that due diligence is not a necessary condition precedent to the granting of a new trial on the ground of newly discovered evidence.

CONCLUSION.

Respondent in his brief herein admits that regardless of due diligence relief under Rule 60(b)(2) would be properly denied by the District Judge if the newly discovered books of account would not probably produce a different result on a new trial.

In our Petition filed herein we pointed out that the production of Records and books of account two and one-half years after the fire would not change the result; that the ground for a directed verdict for Petitioners would merely be different i. e.. that instead of a failure to preserve the Records from destruction by a fire Respondent is barred from recovery by the failure to produce them for inspection and copy by the insurer within a reasonable time after the fire.

Standard policies of insurance such as are here involved not only require the keeping of adequate records and the preservation of the same from destruction by fire but also contain contractual agreements that an insured will furnish the insurer with any and all pertinent information within a reasonable time after the fire i. e. that insured will furnish insurer all pertinent oral information by examination under oath and will produce all books of account, bills, invoices, and other vouchers when and as reasonably required for inspection and copy by insurer.

The contractual provisions to furnish pertinent information both orally and by written records are entered into for the same reasons and are equally binding.. An early examination of insured's records is necessary to permit an insurer, immediately after the fire, to check such records for authenticity prior to possible fraudulent tampering; to trace and corroborate the transactions reflected therein while persons dealing with insured are still available, with their records still in existence, and when the transactions are reasonably fresh in the minds of all concerned; to decide upon its obligations in advance of an expensive trial and prepare to defend or adjust; and generally to protect itself against false claims.

In the Petition here we cited authorities to the effect that the general rule and the Mississippi rule is that a fail-

ure to produce records for examination and copy by the insured in a reasonable time after the fire is not excused by the fact that they are lost, if such records are lost because of the negligence of the insured; that the failure of an insured to furnish the insurer requested pertinent information, either orally or by records, in a reasonable time after the fire, is an absolute bar to recovery.

Respondent in his brief has cited no cases in conflict therewith and has cited no authorities whatsoever on this question. It therefore stands admitted by Respondent.

It is necessary for Petitioners to call on this Court to exercise its power by Writ of Certiorari to assure the proper administration of justice in the lower Federal Court to the end that there shall not be one rule of state law for litigants in state courts and another rule for litigants who bring the same question before the Federal Courts owing to the circumstance of diversity of citizenship.

For the foregoing reasons and for the reasons stated in our original Petition it is respectfully urged that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

Thos. H. Watkins

THOS. H. WATKINS,
ELIZABETH HULEN GRAYSON,
800 Plaza Building,
Jackson, Mississippi,
Counsel for Petitioners.

WATKINS & EAGER,
800 Plaza Building,
Jackson, Mississippi,
Of Counsel.

CERTIFICATE.

The undersigned of counsel for Petitioners certifies that a true and correct copy of the foregoing Reply Brief for Petitioners has been served on the Hon. O. W. Phillips of Magnolia, Mississippi, and the Hon. P. Z. Jones, now being deceased, upon the Hon. M. B. Montgomery of the firm of Barnett, Jones & Montgomery of Jackson, Mississippi, attorneys of record for Respondent, by depositing the same in the United States Post Office or mail box with first class mail postage prepaid, properly addressed, in strict accordance with Rule 33 of the Revised Rules of the Supreme Court of the United States effective July 1, 1954.

This the 1st day of Sept, 1959.

Elizabeth Hulen Grayson

ELIZABETH HULEN GRAYSON,
Of Counsel for Petitioners.